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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-77

No. COA21-190

Filed 17 May 2022

Buncombe County, No. 19 CRS 85718-20

STATE OF NORTH CAROLINA

v.

TRAVIS CHRISTOPHER HAHN, Defendant.

Appeal by Defendant from judgment entered 16 January 2020 by Judge Peter B. Knight in Buncombe County Superior Court. Heard in the Court of Appeals 2 November 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Patrick S. Wooten, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Defendant Christopher Hahn ("Defendant") appeals from his convictions for assault on a government official, malicious conduct by a prisoner, and resisting a public officer. On appeal, Defendant contends the trial court erred by denying his motion to dismiss all charges and by sentencing Defendant for the resisting, delaying, or obstructing a public officer offense. After careful review of the record and

applicable law, we hold Defendant received a fair trial, free from error.

I. Factual and Procedural Background

¶ 2 Asheville Police Department ("APD") Sergeant Rick Tullis ("Sergeant Tullis") has been employed by the APD since 2012. In June 2019, Sergeant Tullis was employed by Manicomio Pizza ("the restaurant"), "as a secondary employment opportunity to provide security for the establishment." Sergeant Tullis testified that local establishments "will employ officers in their off-duty time to provide security . . . for various reasons[,] to have law enforcement powers, [and] powers of arrest . . . ." While officers are "working secondary," they are "still a sworn law enforcement officer."

¶ 3 The restaurant is located on Biltmore Avenue in Asheville, North Carolina. Biltmore Avenue is within Asheville's downtown district and is "very congested." Because there are many businesses, restaurants, stores, and hotels on this street, there is heavy pedestrian traffic utilizing the sidewalks. The restaurant does not have any no trespassing signs in front of the restaurant, and the restaurant does not own the sidewalk. Sergeant Tullis testified:

> They don't own the sidewalk. They have a curtilage that extends to the sidewalk for the purpose – like I said, the owner is not Manicomio Pizza per se, but other businesses that serve alcohol on the sidewalk where it would be otherwise prohibited where patrons sit along the sidewalk and consume their beverages.

The businesses with a curtilage extending to the public sidewalk do not pay for the use of or the upkeep of the sidewalk.

¶ 4 On Saturday, June 1, 2019, Sergeant Tullis was working off-duty at the restaurant. Sergeant Tullis stated on a weekend night in the summer, the area would have been "pretty populated with pedestrian traffic up and down the sidewalk, as well as moderate to heavy vehicular traffic" up and down the Avenue. Approximately an hour and a half after his shift started, Sergeant Tullis observed Defendant standing on the sidewalk in front of the restaurant. Defendant approached Sergeant Tullis and "began a conversation with [him]. And it wasn't really directed at" Sergeant Tullis. "It was more he was just having a conversation." Defendant was speaking to himself. Defendant had long hair and a beard and was homeless. Defendant did not enter the restaurant but remained on the public sidewalk.

¶ 5 Sergeant Tullis initially started his shift during the daylight, and when the sun began to set, he returned to his car to put his sunglasses away. At that time, Sergeant Tullis recalled that Defendant "began following [Sergeant Tullis] across the crosswalk, and at one point he said, 'you better stay in the crosswalk or I will kick your ass.' " When Sergeant Tullis questioned Defendant if Defendant was speaking to him, Defendant "replied he was not, he was talking to somebody else."

¶ 6 When Sergeant Tullis returned to the restaurant, Defendant stood outside on the sidewalk in front of the restaurant and "began becoming more and more loud and

there were curse words involved." According to Sergeant Tullis, Defendant's comments became very loud and belligerent so that it started to "affect not only the pedestrians walking along the sidewalk, but there were patrons entering into the restaurant and there were patrons sitting in the patio just outside the restaurant which is adjacent to the sidewalk as well." When Sergeant Tullis observed that nearby passersby and customers were affected by Defendant's actions, Sergeant Tullis requested the Defendant to "move along" and explained to him that "he was becoming disruptive to the people that were entering and arriving at the restaurant." Initially, Defendant walked about a block away from the restaurant. A minute or two later, Defendant returned to the sidewalk outside the restaurant, and started peering into the restaurant's window. Sergeant Tullis asked Defendant a second time to "move along."

¶ 7 Defendant walked north for approximately a block before returning "back to the front of the restaurant and began standing around." Sergeant Tullis "told him yet one more time that he needed to leave the area, that he was causing a disruption, and if not, he would be arrested." Defendant walked ten to twelve feet away to stand in front of part of the patio portion of the restaurant and "began uttering . . . and mumbling and talking and cursing." At no point did Defendant enter the restaurant.

¶ 8 Shortly after Defendant walked away, Sergeant Tullis "called for assistance from dispatch to have some officers meet [him] regarding" Defendant. When law

enforcement officers arrived, Defendant moved further north on Biltmore Avenue. Law enforcement officers, including Sergeant Tullis, approached Defendant, "informed him that he was being placed under arrest" and handcuffed Defendant. While Defendant was being arrested, "he kicked [Sergeant Tullis] in the shin."[1] Defendant also spat on Sergeant Tullis. At the time of Defendant's arrest, he did not possess any weapons or illegal substances and did not appear to be under the influence of drugs or alcohol.

¶ 9 On November 4, 2019, Defendant was indicted for one count of second-degree trespass; one count of resisting a public officer; two counts of assault on a government official/employee; and one count of malicious conduct by a prisoner. Defendant was deemed competent to proceed to trial and was tried by jury in January 2020. At the close of the State's evidence, Defendant moved to dismiss all charges. His motion was denied. Defendant presented no evidence and renewed his motion to dismiss after the close of all evidence. Defendant was acquitted of second-degree trespass and one count of assault on a government official. The jury convicted Defendant of one count of assault on a government official; malicious conduct by a prisoner; and resisting a public officer. Thereafter, the trial court consolidated the judgments and sentenced Defendant to a minimum of sixteen months and a maximum of twenty-nine months

[1] Sergeant Tullis testified this was a "moderate kick" that occurred when Defendant was "surrounded by three officers who are kind of pushing him up against a car."

incarceration. Defendant timely gave oral notice of appeal in open court.

II. Discussion

¶ 10 Defendant raises several issues on appeal; each will be addressed in turn.

A. Motion to Dismiss

¶ 11 Defendant contends the trial court erred by denying his motion to dismiss the following offenses: (1) resisting an officer, (2) assault on a government official, and (3) malicious conduct by a prisoner. We disagree.

¶ 12 We review "a trial court's denial of a motion to dismiss *de novo*." *State v. Nickens*, 262 N.C. App. 353, 358, 821 S.E.2d 864, 870 (2018) (citing *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007)). In reviewing a trial court's denial of a motion to dismiss for insufficient evidence, this Court determines "whether substantial evidence exists as to each essential element of the offense charged and of the defendant being the perpetrator of that offense." *State v. Noel*, 202 N.C. App. 715, 717, 690 S.E.2d 10, 13 (2010) (quoting *State v. Glover*, 156 N.C. App. 139, 142, 575 S.E.2d 835, 837 (2003)). Substantial evidence is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Glover*, 156 N.C. App. at 142, 575 S.E.2d at 837 (quoting *State v. Barden*, 356 N.C. 316, 351, 572 S.E.2d 108, 131 (2002)).

¶ 13 Whether substantial evidence was presented "is a question of law for the trial court." *Id.* In determining whether substantial evidence existed, the evidence is

considered "in the light most favorable to the State, [and] take[n] . . . to be true . . . ." *Id.* (quoting *State v. Martin*, 309 N.C. 465, 480, 308 S.E.2d 277, 286 (1983)). The State is entitled to every reasonable inference to be drawn therefrom. *See Noel*, 202 N.C. App. at 718, 690 S.E.2d at 13; *Glover*, 156 N.C. App. at 142, 575 S.E.2d at 837; *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

1. Resisting, Obstructing, or Delaying a Public Officer

¶ 14 Defendant first contends the trial court erred by denying his motion to dismiss the charge of resisting, obstructing, or delaying a public officer because he was resisting an unlawful arrest. We disagree.

¶ 15 Pursuant to N.C. Gen. Stat. § 14-223, it is a misdemeanor to "willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office . . . ." N.C. Gen. Stat. § 14-223 (2020). Defendant contends the trial court erred by denying his motion to dismiss, as Sergeant Tullis "lacked probable cause or even reasonable suspicion" to arrest Defendant.

> The offense of resisting arrest, both at common law and under the statute, [N.C. Gen. Stat. §] 14-223, presupposes a lawful arrest. It is axiomatic that every person has the right to resist an unlawful arrest. In such case the person attempting the arrest stands in the position of a wrongdoer and may be resisted by the use of force, as in self-defense.

State v. Mobley, 240 N.C. 476, 478, 83 S.E.2d 100, 102 (1954) (citations omitted); *see also State v. Smith*, 225 N.C. App. 471, 476, 736 S.E.2d 847, 851 (2013) ("The offense

of resisting arrest, both at common law and under the statute, [N.C. Gen. Stat. §] 14-223, presupposes a lawful arrest." (quoting *State v. Jefferies*, 17 N.C. App. 195, 198, 193 S.E.2d 388, 391 (1972))). As a precondition to the misdemeanor violation of resisting arrest, the arrest must be a valid one. Accordingly, our first determination is whether law enforcement lawfully effectuated Defendant's arrest.

¶ 16 "This brings us to the pivotal question presented by this appeal: Was the arrest of the defendant lawful or unlawful? Necessarily, the answer is dependent on whether the officer[] had the right to arrest the defendant without a warrant." *Mobley*, 240 N.C. at 479, 83 S.E.2d at 102. As a "general rule[,] . . . no man should be taken into custody of the law without the sanction of a warrant or other judicial authority." *Id.*; *see also Roberts v. Swain*, 126 N.C. App. 712, 723, 487 S.E.2d 760, 768 (1997) ("Every person has the right to resist an unlawful arrest."). However, "the processes of the early English common law . . . worked out a number of exceptions." *Mobley*, 240 N.C. at 479, 83 S.E.2d at 102.

¶ 17 In accordance with N.C. Gen. Stat. § 15A-401(b)(1), "[a]n officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense . . . in the officer's presence." N.C. Gen. Stat. § 15A-401(b)(1) (2020); *see also State v. Zuniga*, 312 N.C. 251, 259, 322 S.E.2d 140, 145 (1984) ("To be lawful, a warrantless arrest must be supported by probable cause.") (citations omitted). "[A] warrantless arrest by an officer is reasonable under

the Fourth Amendment if, given the objective facts available to the officer at the time of arrest, there is probable cause that a crime has been or is being committed." *State v. Burwell*, 256 N.C. App. 722, 732, 808 S.E.2d 583, 592 (2017) (citations omitted). "Whether probable cause exists depends upon whether at that moment the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a prudent man in believing that the suspect has committed or is committing an offense." *State v. Matthews*, 40 N.C. App. 41, 44, 251 S.E.2d 897, 900 (1979) (cleaned up).

> "Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. . . . To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith." 5 Am. Jur. 2d, Arrest § 44 (1962); *State v. Harris*, 279 N.C. 307, 182 S.E.2d 364 (1971).

State v. Shore, 285 N.C. 328, 335, 204 S.E.2d 682, 687 (1974); *see also Zuniga*, 312 N.C. at 259, 322 S.E.2d at 145. "It is well established that the State must prove that the arrest underlying a charge for resisting arrest was lawful beyond a reasonable doubt." *Smith*, 225 N.C. App. at 476, 736 S.E.2d at 851.

¶ 18 We note that Sergeant Tullis and fellow law enforcement officers arrested Defendant for the offense of second-degree trespass, for which Defendant was later acquitted. However, the United States Supreme Court has stated that "an arresting

officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause" so that his "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." *Devenpeck v. Alford*, 543 U.S. 146, 153, 125 S. Ct. 588, 593-94, 160 L. Ed. 2d 537, 545 (2004)) (citations omitted). As we held in *Burwell*, "it is not necessary that Defendant was arrested for the commission of the offense for which probable cause exists, so long as the facts known to the Officer objectively provided probable cause to arrest him." *Burwell,* 256 N.C. App. at 733, 808 S.E.2d at 592-93 (citing *Devenpeck,* 543 U.S. at 153, 125 S. Ct. 588, 594, 160 L. Ed. 2d 537, 544; *see also Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 1774, 135 L. Ed. 2d 89, 98 (1996) ("[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.") (citation omitted).

¶ 19 Because "warrantless arrests are reasonable under the Fourth Amendment if there is objective probable cause to arrest for the violation of an offense," we expand our analysis beyond the second-degree trespass charge to consider whether given the objective facts and circumstances available to Sergeant Tullis at the time of Defendant's arrest, there is probable cause that a crime had been or was being committed by the Defendant. *Burwell*, 256 N.C. App. at 733, 808 S.E.2d at 592

(citing *Devenpeck*, 543 U.S. at 152, 125 S. Ct. at 593, 160 L. Ed. 2d at 544).

¶ 20 According to Asheville Ordinance § 11-17:

> (a) In this section, the following words and phrases shall have the meanings respectively ascribed to them:
>
> *Public place* shall mean any place to which the general public has access and a right of resort for business, entertainment or other lawful purpose, but does not necessarily mean a place devoted solely to the uses of the public. It shall also include the front or immediate area of any store, shop, restaurant, tavern or other place of business and also public grounds, areas or parks.
>
> (b) It shall be unlawful for any person to loiter, loaf, wander, stand or remain idle either alone or in consort with others in a public place with the intent to:
>
> (1) Obstruct any public street, public highway, public sidewalk or any other public place or building by hindering or impeding or tending to hinder or impede the free and uninterrupted passage of vehicles, traffic or pedestrians;
>
> (2) Obstruct the entrance to any business establishment, without so doing for some lawful purpose, if contrary to the expressed wish of the owner, lessee, managing agent or person in control or charge of the building or premises.
>
> (3) When any person causes or commits any of the conditions in this section, a police officer or any law enforcement officer shall order that person to stop causing or committing such conditions and to move on or disperse. Any person who fails or refuses to obey such orders shall be guilty of a violation of this section.
>
> (c) A violation of this ordinance is a misdemeanor as set forth in North Carolina General Statute Sec. 14-4.

Asheville, N.C., Code of Ordinances ch. 11, art. 1, § 11-17 (2020). In consideration of the above ordinance, the objective facts and circumstances known to Sergeant Tullis provided him with sufficient probable cause to arrest Defendant for violating the loitering ordinance while in the officer's presence.

¶ 21 The trial transcript demonstrates that the particular area in which the incident in question occurred was very congested with heavy pedestrian traffic utilizing the sidewalks. The transcript also indicates that during Sergeant Tullis' interaction with Defendant, although remaining on a public sidewalk, Defendant continued to walk back and forth on the walkway directly in front of the restaurant. Defendant also positioned himself close enough that he was able to gaze through its window at the customers who were seated indoors. Despite Defendant remaining on the public sidewalk and never entering the restaurant, Defendant's actions and positioning caused obstruction to the sidewalk and the entrance to the restaurant. Sergeant Tullis testified that during this incident, Defendant became very loud and belligerent with his comments so that it started to "affect not only the pedestrians walking along the sidewalk, but there were patrons entering into the restaurant and there were patrons sitting in the patio just outside the restaurant which is adjacent to the sidewalk as well."

¶ 22 It was only after Defendant's actions hindered and disrupted the movement of nearby pedestrians and restaurant customers that Sergeant Tullis requested the

Defendant numerous times to "move along." Despite being warned that if he did not stop disturbing the restaurant's patrons and nearby passersby that he would be arrested, Defendant continued to return to the spot located directly outside the restaurant. In accordance with Asheville's Section 11-17 Ordinance, Sergeant Tullis ordered Defendant to "move on" so as to stop obstructing the public sidewalk and the restaurant's entrance. Defendant's refusal to obey Sergeant Tullis' order by subsequently returning to the sidewalk immediately outside the restaurant was a violation of Section 11-17, and thereby, constitutes a misdemeanor. After Sergeant Tullis observed Defendant harassing customers and obstructing the public sidewalk located outside of the restaurant in addition to the restaurant's entrance, there was sufficient probable cause to arrest Defendant for violating Asheville Ordinance Section 11-17. "It is a well-established principle that an officer may make a warrantless arrest for a misdemeanor committed in his or her presence." *State v. Brooks*, 337 N.C. 132, 145, 446 S.E.2d 579, 588 (1994) (citations omitted).

¶ 23 Although the Defendant was not arrested for violating Section 11-17, "there was objective probable cause to do so at the time of Defendant's arrest." *Burwell*, 256 N.C. App. at 734, 808 S.E.2d at 593. It is irrelevant that Sergeant Tullis did not arrest Defendant for violating Section 11-17 as Defendant's arrest was lawful because there was objective probable cause that Defendant committed this misdemeanor in Sergeant Tullis' presence. *Id.* at 733, 808 S.E.2d at 593. Because there was sufficient

probable cause to effectuate Defendant's objectively lawful arrest, we hold the trial court did not err by denying Defendant's motion to dismiss the charge of resisting an officer.

2. Assault on a Government Official

¶ 24 Next, Defendant contends the trial court erred by denying his motion to dismiss the charge of assault on a government official because Defendant's "resistance to an illegal arrest was reasonable and therefore not an assault." We disagree.

¶ 25 Under N.C. Gen. Stat. § 14-33, it is a Class A1 misdemeanor if any person commits any assault, and "in the course of the assault, assault and battery, or affray, he or she: . . . [a]ssaults an officer or employee of the State . . . when the officer or employee is discharging or attempting to discharge his official duties." N.C. Gen. Stat. § 14-33(c)(4) (2020); *see also Noel*, 202 N.C. App. at 718, 690 S.E.2d at 13.

¶ 26 "The offense of resisting arrest . . . presupposes a lawful arrest." *Mobley*, 240 N.C. at 478, 83 S.E.2d at 102. "Likewise, the offense under [N.C. Gen. Stat. §] 14-33(c)(4) of assaulting a public officer when such officer is discharging or attempting to discharge a duty of his office presupposes lawful conduct of the public officer . . . ." *Jefferies*, 17 N.C. App. at 198, 193 S.E.2d at 391. An individual resisting an unlawful arrest has the right to resist "by the use of force, as in self-defense." *Mobley*, 240 N.C. at 478, 83 S.E.2d at 102 (citations omitted); *Jefferies*, 17 N.C. App. at 198, 193 S.E.2d

at 391; *Smith* 225 N.C. App. at 476-77, 736 S.E.2d at 851.

¶ 27 As previously discussed, the officers lawfully arrested Defendant for violation of Asheville Ordinance Sec. 11-17. Therefore, Defendant did not have the right to resist a lawful arrest or exercise his right to self-defense against a lawful arrest. Accordingly, we hold the trial court did not err in denying Defendant's motion to dismiss the offense of assault on a government official, where the evidence tended to show Defendant kicked Sergeant Tullis in the shin during the discharge of his official duty.

3. Malicious Conduct by a Prisoner

¶ 28 Defendant further contends the trial court erred by denying his motion to dismiss the charge of malicious conduct by a prisoner, because "Officer Tullis was not discharging any duties while making an illegal arrest for trespassing."

¶ 29 Section 14-258.4(a) provides, "[a]ny prisoner who knowingly and willfully throws, emits, or causes to be used as a projectile, any bodily fluids, excrement, or unknown substance at an employee, while the employee is in the performance of the employee's duties, is guilty of a Class F felony." N.C. Gen. Stat. § 14-258.4(a) (2020).

¶ 30 Here, Sergeant Tullis testified that local establishments employed APD officers "in their off-duty time . . . to have law enforcement powers [and] powers of arrest." While working off-duty, Sergeant Tullis was "still a law enforcement officer." There is no dispute that Defendant spat at Sergeant Tullis during his arrest.

Accordingly, we hold the trial court did not err by denying Defendant's motion to dismiss the charge of malicious conduct by a prisoner.

B. Sentencing

¶ 31 Defendant next argues that the trial court "erred in sentencing [him] to resisting arrest and assault on [Sergeant] Tullis because in this case 'no line of demarcation' . . . could be drawn." We disagree.

¶ 32 "[T]he charge of resisting an officer . . . and the charge of assaulting a public officer . . . are separate and distinct offenses . . . ." *State v. Kirby*, 15 N.C. App. 480, 489, 190 S.E.2d 320, 326 (1972) (citation omitted); *see State v. Hardy*, 298 N.C. 191, 196, 257 S.E.2d 426, 430 (1979). However, there is a "possibility that the facts in a given case might constitute a violation of both statutes" making the offenses unlawful. *Hardy*, 298 N.C. at 198, 257 S.E.2d at 431. Where the facts of a particular case support a violation of both Section 14-233 (resisting, delaying, or obstructing a public officer) and Section 14-33 (assault on a government official), a "defendant . . . [cannot] be punished twice for the same conduct." *Id.* (citing *State v. Summrell*, 282 N.C. 157, 173, 192 S.E.2d 569, 579 (1972), *overruled in part on other grounds*, *State v. Barnes*, 324 N.C. 539, 380 S.E.2d 118 (1989)).

¶ 33 In *Summrell*, the question before the court was whether the "assaults were the means by which the officer was resisted." 282 N.C. at 173, 192 S.E.2d at 579 (citation and internal quotation marks omitted). Looking at the documents charging the

defendant with both assaulting an officer and resisting an officer, our Supreme Court noted that "at the conclusion of the evidence, it had become quite clear that no line of demarcation between [the] defendant's resistance of arrest and his assaults upon the officer could be drawn." *Id.*

¶ 34 The case presently before us, however, is distinguishable. Here, the basis for Defendant's resisting arrest was "fighting and spitting." However, the basis for Defendant's charge of assault on a government official was "kicking [the] officer in the leg." One law enforcement officer described Defendant's resistance as being separate and distinct from his kick to Sergeant Tullis:

> We were trying to get [Defendant], as we grabbed a hole [sic] of him this is when he became resistive. As we tried to turn him to a vehicle in order to brace him for his safety and ours, he reacted by kicking Sergeant Tullis in the leg as we were turning him to brace him or stabilize him on a nearby vehicle based on his combative reaction to us placing him under arrest.
>
> . . .
>
> [H]e was resisting us and that's a pretty intense time when you have somebody actively resisting.

The body camera footage of Defendant's arrest showed that he verbally protested by repeatedly stating, "Whoa," and resisted by rapidly shaking his hands and moving his hands up and down behind his back while the officer was handcuffing him. Defendant kicked Sergeant Tullis in the shin after the officer had him in handcuffs. Accordingly, the "assault" of kicking the officer was not "the means by which the

officer[s] [were] resisted." *Id.* (citing *State v. Midyette*, 270 N.C. 229, 234, 154 S.E.2d 66, 70 (1967), *overruled by State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986)).

III. Conclusion

¶ 35 After careful review of the record and applicable law, we hold Defendant received a fair trial, free from error.

NO ERROR.

Judges DILLON and GORE concur.

Report per Rule 30(e).